Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

REX FORNARO,

Petitioner,

v.

WILLIAM S. GANNON, ESQ.
WADLEIGH, STARR & PETERS, PLLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

REX FORNARO
Petitioner
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QUESTIONS PRESENTED FOR REVIEW

The questions presented below relate to the legal protection afforded to any person who identifies and reports public-safety related issues. The protection afforded to any person should be definitive thereby promoting the populace to identify and report public-safety related issues, thus leading to a safer society.

1. Although uncontradicted evidence confirms, and the First Circuit acknowledged, that Petitioner complained about the safe operation of the passenger airline Business Express (BEX), did the First Circuit infringe Petitioner's First Amendment Rights to the U.S. Constitution for such protected speech by affirming summary judgment in favor of Respondents?

2. Has the appropriate standard for summary judgment requiring that there is no genuine issue as to any material fact, and that all reasonable inferences and disputed facts be resolved in favor of the non-moving party been violated by the First Circuit affirming summary judgment, thereby infringing Petitioner's Rights of Due Process protected by the Fifth and Fourteenth Amendment to the U.S. Constitution?

3. Which Federal Circuit standard pertaining to the temporal proximity sufficient to establish causation in retaliation claims is necessary to withstand a motion for summary judgment?

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PETITION FOR A WRIT OF CERTIORARI

Rex Fornaro, respectfully petitions this Court to issue a writ of certiorari to review the decision of the First Circuit Court of Appeals in this case.

OPINIONS BELOW

The First Circuit Court of Appeals affirmed the district court's granting summary judgment to Respondents on December 1, 2004. App. 1. Petitioner timely filed a Petition for Panel Rehearing/Rehearing En Banc with the First Circuit, which was denied by an unpublished Order entered on February 1, 2005. App. 25.

The unpublished opinion and order of the district court and of the First Circuit Court of Appeals affirming summary judgment together with the denial of Petition for Panel Rehearing/Rehearing En Banc are included in the appendix to this petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Constitutional Right to Freedom of Speech and the Due Process Clause of Amendment V to the Constitution of the United States, which provides, in pertinent part, that no person shall

"... be deprived of ... property, without *due process* of law; ..." as well as Equal Protection of the laws contained in Amendment XIV to the Constitution of the United States.

STATEMENT OF THE CASE

During Petitioner's employment with Business Express Airlines (BEX) in Westport, CT, Petitioner witnessed BEX aircraft conducting passenger operations with aircraft that were not airworthy as a result of the severe regulatory violations that frequently occurred at BEX. At the time, a BEX aircraft had recently crashed in a nearly inverted attitude in the Atlantic Ocean killing all aboard. Petitioner complained directly to BEX managers Wayne C. Heller (Heller) and John O'Brien (O'Brien) on January 30, 1994, emphasizing that BEX should operate its airline safely during an interstate telephone conversation recorded pursuant to 18 U.S.C. § 2511. App. 12. FAA Inspector Costa confirmed, during a similarly recorded conversation, that Costa investigated and notified BEX of Petitioner's "dispatch" complaint that was filed with the FAA on January 29, 1994. Petitioner's complaints to both the FAA and to BEX managers Heller and O'Brien pertained to BEX's violations of Federal Aviation Regulations (FAR) that jeopardized the safety of BEX passenger flight operations. App. 12. Heller threatened to fire Petitioner on February 4, 1994, noting Petitioner's prior employment with the FAA. App. 13. Petitioner was fired by Heller on February 28, 1994 from BEX shortly after Petitioner complained *directly* to Heller and O'Brien, Petitioner's then supervisors at BEX, and to the FAA Aviation Safety Hotline (FAA). BEX subsequently filed for bankruptcy.

During the bankruptcy hearing, Heller testified that he was responsible for firing Petitioner and the decisive reason Petitioner was fired was because Petitioner "posed a significant safety threat". App. 29-33. BEX manager Mary DePaola testified that she was responsible for producing *un*signed tardiness reports, the first of which is dated July 10, 199[4], App. 28, when Petitioner was fired on February 28, 199[4], making tardiness impossible according to BEX written records. Every report in Petitioner's BEX employment file is unsigned by Petitioner in violation of the provisions of the forms and BEX company policy, suggesting these reports were produced after Petitioner's termination to conceal the retaliatory discharge.

Subsequently, both sides aviation experts confirmed that EVERY safety report in Petitioner's BEX personnel file is without merit, App. 34, demonstrating that safety, the basis for Petitioner's termination, is false and therefore a pretext, thus establishing every essential element necessary to prove the retaliatory discharge claim before the district court. Further, the uncontradicted aviation expert's confirmation that every safety report is false impeaches the *un*signed tardiness reports as BEX managers Heller and DiPaola were responsible for producing both the safety and tardiness reports. App. 34-36.

Defendant Gannon, Petitioner's then counsel, missed the deadline to amend Petitioner's proof of claim in the bankruptcy proceeding captioned *Fornaro v. Business Express*, creating an irreconcilable conflict of interest. During the bankruptcy trial, Attorney Gannon withheld the above referenced tape recordings of Petitioner's *direct* safety complaints to BEX managers and the tape recording confirming FAA Inspector Costa investigated and notified BEX of Petitioner's January 29, 1994 complaint to

the FAA. Attorney Gannon also refused to engage an aviation expert to demonstrate that every safety report in Petitioner's BEX personnel file is falsified to demonstrate safety, the basis for Petitioner's firing is a pretext and to impeach the tardiness reports.

Accordingly, it was impossible for Petitioner to succeed before the bankruptcy court or on appeal due to Gannon withholding the tape recordings of protected speech together with the lack of expert analysis demonstrating every safety report is falsified, thus forcing the malpractice action captioned *Fornaro v. Gannon, et al.* in the district court. Attorney Gannon's history of conflict representation and fraud on the court is outlined in the First Circuit opinion, *Pearson v. First N.H. Mortgage Corp.*, 200 F.3d 30 (1st Cir. 1999).

In opposing summary judgment in the matter captioned *Fornaro v. Gannon, et al.*, before the district court were the transcripts of the recorded conversations of Petitioner complaining *directly* to BEX managers emphasizing the safety of BEX passenger flight operations (true 31-51q claim), and of FAA Inspector Costa confirming Costa investigated and notified BEX of Petitioner's complaint to the FAA Safety Hotline made on January 29, 1994.

Petitioner also provided the district court with Heller's bankruptcy court testimony confirming Heller fired Petitioner for allegedly posing a "significant safety threat". App. 29-33. The district court was also provided with undisputed aviation expert analysis confirming that EVERY safety report in Petitioner's BEX personnel file is without merit, demonstrating safety, the basis for termination, is false and therefore a pretext. App. 34-36. Every

essential element necessary to demonstrate Petitioner's retaliatory discharge claim was present before the district court, prohibiting summary judgment for Respondents. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The district court granted summary judgment in favor of Respondents, holding that BEX was unaware that one of its employees had made a complaint. App. 24. It is impossible for BEX manager Heller not to have known of Petitioner's *direct* safety complaints to Heller that were recorded on January 30, 1994. App. 12. Further FAA Inspector Costa's recorded confirmation that Costa investigated and notified BEX of Petitioner's January 29, 1994 complaint to the FAA Safety Hotline similarly makes the district court finding impossible.

Petitioner timely filed his notice of appeal for First Circuit review of the impossible basis the district court reached in granting summary judgment. The First Circuit recognized " . . . that the district court overlooked certain evidence (e.g., the Costa tape) and that the court did not address what plaintiff now says was his "'true § 31-51q' claim" (complaints to Heller and O'Brien). App. 11.

Incredibly, the First Circuit found that, " . . . it was just barely possible that the FAA investigated plaintiff's complaint . . . ". App. 13. This finding by the First Circuit is similarly impossible as FAA Inspector Costa informed Petitioner during the recorded conversation:

C: Costa F: Fornaro

F: And I was wondering there was a complaint filed on the 29th of January 1994 about staffing deficiencies and I'd like to know what date your office contacted Business Express to inform them of that?

C: Staffing deficiencies in what area?

F: In flight operations to include the flight crews

C: You mean *Dispatch* (emphasis)

F: Yes

. . .

C: Well uhh . . . I was the POI (Principal Operations Inspector) at that time, . . . but I do remember somebody stating that the *dispatch was overbooked so I went down and checked on it* . . . but I am *sure that the company (BEX) was notified of it (complaint)* . . . " (emphasis)

F: You are?

C: *Yes* (emphasis)

Finding that the FAA "just barely possible" investigated Petitioners "dispatch" complaint is contrary to FAA Inspector Costa's recorded confirmation. To date, BEX has not offered any evidence that another BEX employee also complained to the FAA regarding the staffing levels at BEX dispatch that violated numerous Federal Aviation Regulations (FAR), including FAR 121.395. Therefore the Costa recording *confirms* that FAA Inspector Costa investigated a "dispatch" complaint filed on January 29, 1994 as a result of Petitioner's complaint to the FAA Safety Hotline.

The First Circuit similarly concluded, " . . . that no reasonable jury could find that BEX discharged plaintiff 'on account of' the *safety-related* statements that he made to his supervisors in the context of complaining about his work schedule." App. 14. This finding conflicts with the First Circuits own finding establishing " . . . plaintiff

emphasized that BEX should . . . operate its airline *safely* . . . ", App. 12, during Petitioner's recorded complaints to BEX manager Heller, who testified he was responsible for firing Petitioner.

The recordings of Petitioner complaining *directly* to BEX managers and FAA Inspector Costa's recorded confirmation that he investigated and notified BEX of Petitioner's January 29, 1994 complaint to the FAA was the basis for Law Prof. Martin Margulies, Connecticut's leading Free Speech expert, to submit his *un*contested expert opinion confirming that Petitioner's direct complaints to Heller and O'Brien regarding the safety of BEX passenger flight operations are protected by the First Amendment. An example of the safety complaints memorialized on audio tape that Petitioner made directly to Heller includes Petitioner stating to Heller, " . . . I don't think its safe to operate in that fashion". Petitioner complained to Heller regarding the safety of BEX flight operations six (6) times during the recorded conversation.

REASONS FOR GRANTING THE WRIT

This case involves questions of exceptional national importance pertaining to airline safety – a significant public interest, U.S. Constitutional Rights of Free Speech, Due Process and Equal Protection as well as Employment Discrimination. The decisive legal rulings delineated below conflict with the clear principles this Court has established on Free Speech, Due Process, Employment Discrimination, and Rights guaranteed by the U.S. Constitution.

Every safety report in Petitioner's BEX personnel file has been demonstrated to be false by uncontradicted aviation expert analysis. Left uncorrected, the adverse BEX employment history will continue to harm Petitioner's career, in retaliation for Petitioner's efforts to uphold federal law, protect the flying public, and prevent further fatalities that had recently occurred at Business Express Airlines. This case also establishes dangerous precedent for other whistleblowers, which is intolerable in a post 9/11 era. This Court should grant certiorari to reinforce that whistleblowers will be provided the utmost protection by law, thereby encouraging any person to identify and report safety-related issues, thus leading to a safer society.

I. PETITIONER'S RIGHTS OF FREE SPEECH GUARANTEED BY THE FIRST AMENDMENT WERE DEPRIVED BY THE FIRST CIRCUIT ERRONEOUSLY AFFIRMING SUMMARY JUDGMENT NOTWITHSTANDING THE FIRST CIRCUIT CONFIRMING THAT PETITIONER "EMPHASIZED THAT BEX SHOULD ... OPERATE ITS AIRLINE SAFELY" DURING PETITIONER'S RECORDED COMPLAINTS TO BEX MANAGER HELLER, THE INDIVIDUAL RESPONSIBLE FOR FIRING PETITIONER.

This Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

The First Circuit correctly acknowledged that Petitioner " . . . *emphasized* that BEX should employ enough

staff to operate its airline *safely* . . . ", App. 12, in complaining to Heller on January 30, 1994. This acknowledgment overwhelmingly demonstrates that Petitioner's direct complaints to BEX manager Heller relates to the safety of BEX passenger flight operations, clearly a public concern. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138 (1983). Under *Connick* and its progeny, employee speech must address matters of public concern, as opposed to purely personal concerns such as the employee's own status or standing in the workplace. *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 781 (2d Cir.), *cert. denied*, 502 U.S. 1013 (1991). Whether employee speech addresses matters of public concern is a question of law. *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Lewis v. Cowen*, 165 F.3d 154, 161-62 (2d Cir. 1999) (citations omitted).

Therefore the First Circuit correctly found that Petitioner " . . . *emphasized* that BEX should employ enough staff to operate its airline *safely* . . . ", App. 12, to then erroneously find, " . . . that no reasonable jury could find that BEX discharged plaintiff "on account of" the *safety-related* statements that he made to his supervisors . . . ". App. 14. The First Circuit failed to explain how Petitioner's complaints emphasizing safety, would not allow a reasonable jury to find that BEX discharged Petitioner "on account of" the *safety-related* statements that he made to his supervisors.

Moreover, Heller testified before the bankruptcy court that Petitioner was fired because he posed a "significant safety threat". App. 29-33. Every safety report in Petitioner's BEX personnel file has been proven false by

uncontested aviation expert analysis, App. 34, establishing Petitioner could not be fired for safety reasons in the absence of Petitioner's safety complaints to BEX managers and to the FAA, while also impeaching the unsigned tardiness reports, the first one dated after Petitioner's firing. *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The uncontested fact that Petitioner complained privately and directly to BEX manager Heller regarding the safety of BEX flight operations further establishes Petitioner's direct complaints to Heller are protected by the First Amendment. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979). Because the First Circuit's interpretation of First Amendment doctrines is an innovation, this Court should grant certiorari to guide the First Circuit back to established precedent that recognizes the First Amendment's primary aim is the full protection of speech upon issues of public concern.

II. PETITIONER'S RIGHTS OF DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT WERE DEPRIVED WHEN THE FIRST CIRCUIT GRANTED SUMMARY JUDGMENT BY RESOLVING DISPUTED FACTS IN FAVOR OF THE MOVANT, INCLUDING ISSUES OF CREDIBILITY.

The lower court's allowance of summary judgment was improper because the court did not evaluate the record evidence in accordance with the proper standards for deciding summary judgment motions and the court usurped the function of the jury by making findings of fact and drawing inferences from the evidence in favor of the movant, rather than determining whether genuine issues of material fact had been raised. *LaFond v. Gen. Physics*

Servs. Corp., 50 F.3d 165 (2d Cir. 1995). The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Such evidence is required to be viewed in the light most favorable to the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

A plaintiff's burden in establishing a prima facie case is not intended to be an onerous one. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 870 (6th Cir. 2001). Any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994).

Here, the First Circuit found, "Sometimes, plaintiff was late for work. Although plaintiff insists that it (tardiness) was all a fabrication . . . ". App. 12. BEX's evidence of tardiness before the bankruptcy court consisted of tardiness reports, ALL *un*signed by Petitioner, in violation of BEX company policy and the provisions of the tardiness form itself. The first tardiness report is dated July 10, 199[4], when Petitioner was fired on February 28, 199[4] – nearly five months *after* Petitioner's firing making Petitioner's tardiness impossible according to BEX written records. Ms. DiPaola's bankruptcy court testimony confirmed that she dated the first tardiness report July 10, 199[4], which was before the district court and the First Circuit. App. 28. If more were needed, BEX's tardiness records for February 1994 consisted of incomplete computerized printouts from BEX's security system containing entry and exit times for other BEX employee's, however Petitioner's alleged entry time on February 28, 1994 required Heller's *handwritten* entry alleging tardiness on the day Heller fired Petitioner. The BEX security system was not even able to demonstrate the alleged tardiness

casting significant doubt on the tardiness records and raising the crucial issue of credibility that was erroneously resolved in favor of the movant.

Significantly, the First Circuit stated, " . . . the report of plaintiff's aviation expert did nothing to undermine the evidence of plaintiff's tardiness." App. 14. Both sides' aviation experts agreed that EVERY safety report in Petitioner's BEX file is without merit and false. BEX managers Heller and/or DiPaola were responsible for the production of the false safety reports and of the unsigned tardiness reports, easily allowing a reasonable jury to infer that the incorrectly dated and unsigned tardiness reports were also falsified, similar to the proven false safety reports.

Numerous federal circuits have cautioned that "summary judgment should seldom be used in employment-discrimination cases." By granting summary judgment the courts below failed to consider BEX's intent and failed to apply the summary judgment standard "with added rigor in employment discrimination cases, where intent and credibility are crucial issues." Summary judgments "should seldom be used in employment discrimination cases." *O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999) (quoting *Smith v. St. Louis University*, 109 F.3d 1261, 1264 (8th Cir. 1997). Because discrimination claims often turn on the employer's intent, courts ordinarily consider summary judgment inappropriate to settle an issue like intent. *Cone v. Longmont United Hosp. Association*, 14 F.3d 526, 530 (10th Cir. 1994); *see Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994) (stating that "the summary judgment standard is applied 'with added rigor in employment discrimination cases,

where intent and credibility are crucial issues.'") (citations omitted).

The First Circuit resolved disputed issues of fact in favor of the movant by establishing BEX's disputed allegation of tardiness as undisputed fact, when the tardiness records are suspect as they are unsigned by Petitioner, admittedly dated incorrectly and therefore impossible to be true, thus raising the crucial issue of credibility. Moreover, the First Circuit found in favor of the movant by finding that it was "just barely possible that the FAA investigated plaintiff's complaint . . . " App. 13. As outlined above, the transcript of FAA Inspector Costa confirms Costa investigated and notified BEX of Petitioner's January 29, 1994 complaint to the FAA which was before the district court and the First Circuit. The First Circuit also acknowledged that Petitioner, "*emphasized* that BEX should . . . operate its airline safely" during Petitioner's *direct* complaint to Heller, who clearly knew of Petitioner's complaints on January 30, 1994 App. 12. prior to firing him on February 28, 1994. App. 13.

Therefore, the crucial issue of credibility that the lower courts improperly decided in favor of movant, by granting summary judgment, is contrary to the standard established by the Tenth, Eighth and Seventh Circuits and the Supreme Court. Finally, the evidence of pretext indicates that the issue of retaliation should go to a jury. *Pastran v. K-Mart Corp.*, 210 F.3d 1201 (10th Cir. 2000).

Accordingly, even Respondents' counsel confirmed in a February 19, 2002 letter to Respondents' insurance carrier that, " . . . this case will now be decided by a jury . . . " based upon the facts established in Petitioner's expert

reports that were before both the district court and the First Circuit.

Every essential element necessary to demonstrate Petitioner's claim for retaliatory discharge was before the district court and the First Circuit thereby precluding the granting of summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, summary judgment was clearly improper as the lower courts resolved factual issues in favor of the movant, instead of determining whether factual issues exist for trial. The First Circuit erroneously made disputed allegations of tardiness, into undisputed issues of fact to improperly grant summary judgment. App. 12. This Court should grant certiorari because the First Circuit's holding does not follow established Supreme Court precedent and is inconsistent with numerous other Federal Circuits.

III. THE TEMPORAL PROXIMITY SUFFICIENT TO ESTABLISH CAUSATION IN RETALIATION CLAIMS.

In this matter Petitioner complained directly to BEX manager Heller on January 30, 1994. A falsified safety report was inserted in Petitioner's BEX personnel file without his knowledge on January 31, 1994. App. 36. Heller (without justification) threatened to fire Petitioner on February 4, 1994, App. 13, and Petitioner was fired on February 28, 1994 – four weeks after Petitioner's complaint directly to BEX manager Heller and his complaint to the FAA Aviation Safety Hotline on January 29, 1994. App. 12.

Although Petitioner offered facts to support every essential element of his claim, and the First Circuit

acknowledged that Heller threatened to fire Petitioner within five days of Petitioner's protected speech, summary judgment was entered against him. In doing so, the First Circuit standard is vastly different from the standard established by numerous other Federal Circuits with respect to causation. The Tenth Circuit held, causal connection can be shown by "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Burrus v. United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982). *See also Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (assuming that temporal proximity of two months and one week is sufficient to support a prima facie case of retaliation); *see also Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity sufficient as a matter of law to establish final element in a prima facie case.); *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1105-06 (8th Cir. 2000) (extensive pattern of protected activity followed by disciplinary measures established causation); *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1193-94 (8th Cir. 1995) (three months between filing administrative complaints and firing established causal connection); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997) (stating that "temporal proximity between the protected activity and the termination is sufficient to establish a causal link"); *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554-55 (2d Cir. 2001) (five months not too long to support an inference of causation; four months sufficient to establish causation to survive summary judgment; noting that the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the

exercise of a federal constitutional right and an allegedly retaliatory action" but that other circuits have done so.); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997) (finding an inter-circuit conflict concerning the element of causation and proving a causal connection through timing).

In *Rebarchek v. Farmers Co-op Elevator & Mercantile Ass'n*, 272 Kan. 546, 553, 35 P.3d 892 (2001), the Kansas Supreme Court held that the passage of slightly more than five months between the plaintiff's filing of his workers compensation claim and his discharge "probably approaches the limit that would be recognized as part of a pattern for the purpose of establishing a causal connection between the protected activity and termination." 272 Kan. at 556.

The First Circuit decision in this matter acknowledged that Heller threatened to fire Petitioner on February 4, 1994, five days after Petitioner complained directly to Heller "emphasizing" BEX should operate its airline safely and six days after Petitioner's complaint to the FAA. Heller made note of Petitioner's prior employment with the FAA in threatening to fire Petitioner on February 4, 1994. App. 12-13.

In *Clark County School District v. Breeden*, 532 U.S. 268 (2001), the Supreme Court noted that courts examining temporal proximity as evidence of the causation element in the prima facie case of retaliation require the connection to be "very close." *Id.* at 273 (*quoting O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001). The facts present in this matter, applied to the various federal circuit standards outlined above, would have established causation and a prima facie case of retaliation,

thus precluding summary judgment. Instead, the First Circuit established that causation is not for the jury in a matter where Petitioner was threatened to be fired within five days of his *directly* complaining to Heller, and was ultimately fired four weeks later. If more were needed, a demonstrably false safety report was inserted in Petitioner's BEX file on January 31, 1994 without his knowledge, the day following Petitioner's direct complaints to Heller. App. 12, 36.

The prima facie and pretext showings of causation should be clear in order to ensure that the *McDonnell Douglas* framework remains efficacious in the context of cases alleging retaliation. In *Breeden*, the Court found that courts relying on temporal proximity generally hold that the timing must be very close. Still, the exact limits of what defines very close timing remains a question. In *McDonnell Douglas*, the Court granted certiorari in order to clarify the standards governing the disposition of an action challenging employment discrimination. However, because of the varying standards among the Federal Circuits pertaining to the establishment of causation, the *McDonnell Douglas* framework does not yet provide a uniform standard governing the disposition of an action challenging employment discrimination.

Every standard enumerated above from the various federal circuits, applied to the facts in this matter, establishes causation that would have precluded the granting of summary judgment.

This Court should grant certiorari to standardize the temporal proximity sufficient to establish causation in retaliation claims thereby providing a uniform standard.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari, and decide this case consistent with its holding in *Connick v. Myers*, 461 U.S. 138 (1983); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and to standardize the temporal proximity sufficient to establish causation in retaliation claims.

Respectfully submitted,

Dated: May 2, 2005

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United States Court of Appeals
For the First Circuit

No. 03-1816

REX FORNARO,

Plaintiff-Appellant,

v.

WILLIAM S. GANNON, ET AL.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, *U.S. District Judge*]

Before

Torruella, *Circuit Judge*,
Cyr, *Senior Circuit Judge*,
and Lynch, *Circuit Judge*,

Rex Fornaro on brief pro se.

Michael M. Lonergan, *Margaret H. Nelson* and *Sulloway & Hollis, P.L.L.C.* on brief for appellees.

December 1, 2004

Per Curiam. *Pro se* plaintiff Rex Fornaro appeals a district court order that granted the defendants summary judgment in this legal malpractice action. Plaintiff maintains that the defendants, New Hampshire attorney William S. Gannon and the law firm of Wadleigh, Starr & Peters, PLLC (WS&P), negligently litigated certain retaliatory discharge claims against plaintiff's former employer in the New Hampshire bankruptcy court. While plaintiff has correctly identified minor errors in the district court's description of the evidence, we conclude that the court reached the correct result and that the plaintiff's claims of procedural error also fail. Accordingly, we affirm, for the reasons explained below.

I.

Between 1993 and 1994, plaintiff worked as a flight dispatcher for Business Express Airlines (BEX). On February 28, 1994, BEX fired plaintiff. Plaintiff secured Connecticut counsel and filed a civil wrongful discharge action against BEX in the Connecticut superior court. *Inter alia*, his complaint alleged that BEX terminated plaintiff for reporting BEX's alleged violation of flight safety statutes and regulations to the Federal Aviation Administration (FAA) and to other agents, servants, or employees of BEX. Plaintiff sought compensatory and punitive damages on the grounds that BEX discharged him for exercising his constitutional rights to free speech, as protected by Conn. Gen. Stat. Ann, § 31-51q, and in

violation of Connecticut's Whistleblower Law, Conn. Gen. Stat. Ann. § 31-51m.[1]

BEX removed plaintiff's civil action to federal court. Thereafter, an involuntary Chapter 11 petition for BEX's bankruptcy was filed with the New Hampshire bankruptcy court, and plaintiff's Connecticut counsel filed a proof of claim on his behalf. Plaintiff then hired the defendants to represent him on his retaliatory discharge claims against BEX in the New Hampshire bankruptcy court.[2] Attorney Gannon represented plaintiff in a two-day trial of these claims. Plaintiff maintained that BEX fired him because he made an anonymous telephone complaint about BEX's short-staffing to the FAA on January 29, 1994, one month before his discharge. Testifying on behalf of BEX's Official Unsecured Creditors Committee (OUCC), plaintiff's former supervisors at BEX maintained that they fired plaintiff for chronic tardiness and that they did not know about his anonymous complaint to the FAA when they fired him.

The bankruptcy court disallowed plaintiff's claim in its entirety. Assuming that both of plaintiff's statutory claims were based on his anonymous complaint to the FAA, the bankruptcy judge ruled that plaintiff failed to prove that BEX terminated him in violation of Conn. Gen. Stat. Ann. §§31-51m and 31-51q because the evidence failed to show that BEX knew about that complaint before

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[1] Plaintiff's complaint also asserted common law claims that are not implicated in the instant appeal. We do not address them.

[2] The defendants also filed a separate civil action against BEX's officers and directors on plaintiff's behalf. The district court dismissed that action, and this court summarily affirmed. *See Fornaro* v. *McManus*, 187 F.3d 621 (1st Cir. 1998) (Table).

it fired plaintiff. The judge further concluded that even if BEX had such knowledge, plaintiff's supervisors had established that plaintiff's tardiness was a legitimate, non-retaliatory reason for his discharge and that plaintiff had failed to prove that this reason was a pretext.

Still represented by attorney Gannon, plaintiff appealed the bankruptcy court's decision to the district court. While that appeal was pending, plaintiff consulted attorney John Burwell Garvey at present defense counsel's law firm (Sulloway and Hollis) with an eye toward securing representation in this legal malpractice action. Ultimately attorney Garvey declined to represent plaintiff. Seeking $10 million in damages, plaintiff filed a *pro se* complaint for legal malpractice that alleged, *inter alia*, that attorney Gannon negligently failed to present sufficient evidence that BEX fired plaintiff in retaliation for his complaint to the FAA. Attorney Gannon promptly withdrew from plaintiff's bankruptcy appeal, and the district court allowed plaintiff's *pro se* motion to dismiss it. Present defense counsel filed an answer approximately four months after attorney Garvey had declined to take plaintiff's side in this case.

At the initial pretrial conference plaintiff suggested that defense counsel might have a conflict of interest because plaintiff had consulted another attorney at Sulloway and Hollis before he filed this lawsuit. Defense counsel indicated that he had looked into the matter and did not believe that he had a conflict of interest. The magistrate judge gave plaintiff until December 1, 2000 to file a motion to disqualify defense counsel. Plaintiff did not do so.

Approximately one year later, plaintiff secured his own counsel.[3] The parties engaged in discovery and the court scheduled a jury trial to begin on May 6, 2003. One day before the filing deadline for the defendants' motion for summary judgment, plaintiff's counsel both moved to withdraw. Citing only "irreconcilable disputes and conflicts . . . concerning litigation strategy and other substantive matters," counsel informed the court that plaintiff opposed withdrawal and requested an *in camera* hearing. Without holding a hearing, the district court promptly allowed counsel's motions.

Plaintiff moved for reconsideration. *Inter alia*, he complained that neither of his attorneys had identified a reason that justified his withdrawal with a trial date set and a dispositive motion pending and that the court should hold a hearing and deny counsel's motions or, alternatively, extend all deadlines by sixty (60) days. After plaintiff's now-withdrawn attorneys filed oppositions, the district court denied plaintiff's motion for reconsideration while granting his request for an extension. Judged from the time plaintiff submitted his motion for reconsideration, plaintiff received another sixty (60) days to find new counsel and ninety (90) days to oppose the defendants' motion for summary judgment.

Stripped of his own counsel by the order denying reconsideration, plaintiff sought to disarm his opponents by filing a motion to amend his complaint to name Sulloway and Hollis and the attorney he had previously consulted

[3] Plaintiff was represented by two attorneys in the district court. A Massachusetts attorney served as lead counsel and a New Hampshire attorney appeared as local counsel.

there, John Burwell Garvey, as defendants. Plaintiff purported to state a separate legal malpractice claim against these attorneys on the ground that attorney Garvey gave plaintiff bad advice about the statute of limitations that governed his malpractice claim against attorney Gannon. In addition, plaintiff alleged that he gave attorney Garvey privileged information to see if Garvey would represent him in this case, that present defense counsel improperly had access to that information, and that the district court should discipline Sulloway and Hollis for unethical conduct. The defendants urged the court to deny plaintiff's motion to amend his complaint and to sanction plaintiff for trying to force a change in defense counsel long after the deadline for filing a motion for disqualification had expired.

The magistrate judge denied plaintiff's motion to amend his complaint as both "untimely (unduly delayed and prejudicial so close to trial) and as futile (failing to state a cause of action)." Plaintiff filed a motion for reconsideration and a motion for leave to file a reply to the defendants' objection to his motion to amend his complaint that specifically asked the district court to disqualify present defense counsel on the ground that plaintiff had disclosed confidential information to attorney Garvey. Without specifically addressing the disqualification issue, the magistrate judge endorsed plaintiff's proposed reply "moot" in light of his previous order denying plaintiff's motion to amend his complaint. Plaintiff's motion for reconsideration of that order remained pending.

Thereafter, the district court docketed plaintiff's timely opposition to the defendants' motion for summary judgment and the defendants' reply to same. Two days later, the district judge announced that he had decided to

grant the defendants' motion and that an opinion justifying the court's decision would follow. Plaintiff moved for reconsideration. The court then issued an unpublished opinion which ruled that none of the evidence that plaintiff claimed attorney Gannon should have offered in the bankruptcy court would have made any difference to the trial's outcome because that evidence still failed to show that BEX knew about plaintiff's complaint to the FAA. Simultaneously, the court denied plaintiff's motion for reconsideration of the summary judgment order and his motion for reconsideration of the order denying his motion to amend his complaint to add Sulloway and Hollis and attorney Garvey as defendants. Plaintiff filed a timely notice of appeal.

II.

On appeal, plaintiff argues that the district court erred in granting the defendants summary judgment. In addition, plaintiff contends that the district court abused its discretion by allowing his attorneys to withdraw and thereafter denying plaintiff's motion to amend his complaint to make Sulloway and Hollis and attorney John Burwell Garvey defendants. Repeatedly citing *Pearson* v. *First N.H. Mortgage Corp.*, 200 F.3d 30 (1st Cir. 1999), plaintiff implies that he deserves a second bite at the apple because the district court required him to proceed *pro se* involuntarily and because defense counsel has a conflict of interest. We disagree.

We review the orders granting plaintiff's attorneys' motions to withdraw only for an abuse of discretion. *See*, *Andrews* v. *Bechtel Power Corp.*, 780 F.2d 124, 134 (1st Cir. 1985). Plaintiff contends that the district court abused its

discretion by allowing his attorneys to withdraw with a trial date set, a dispositive motion pending, and without the requisite showing of "good cause" or a hearing on counsel's motions. Defendants say that the district court did not abuse its discretion because the court gave plaintiff sufficient time to find new counsel and respond to their summary judgment motion. The defendants have the better argument.

Counsel's motions to withdraw were governed by New Hampshire Rule of Professional Conduct 1.16. In relevant part, this rule provides that: "a lawyer . . . *shall* withdraw . . . if (1) the representation will result in violation of the rules of professional conduct . . . . [,]" *see* Rule 1.16(a), and that: "a lawyer *may* withdraw . . . *if* withdrawal can be accomplished without material adverse effect on the interests of the client, *or if*: . . . (6) other good cause for withdrawal exists." *See* Rule 1.16(b) (emphasis supplied). The Comments to this rule suggest that the district court had the discretion to treat plaintiff's counsel's representation that "irreconcilable disputes and conflicts" existed as sufficient cause for withdrawal without requiring counsel to spell out the conflicts at an *in camera* hearing.[4] Moreover, here the plaintiff and his counsel were able to air

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[4] The ABA Model Code Comments that accompany Rule 1.16 recognize that:

> Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.* (emphasis supplied).

their dispute through plaintiff's motion for reconsideration and subsequent filings which confirmed that their relationship had become acrimonious. Since plaintiff had represented himself during the first year and a half that this case was pending and trial was still two months away when the court denied reconsideration, the court could reasonably assume that allowing withdrawal would not have a material adverse effect on plaintiff. The district court gave plaintiff a fair shot at finding successor counsel and opposing the defendants' motion for summary judgment by granting plaintiff the extensions he requested.

If more were needed, we note that the record suggests that plaintiff and his counsel had at least one serious disagreement over what the rules of professional conduct required plaintiff's counsel to do in light of defense counsel's inadvertent disclosure of a privileged communication. This alone supplies "good cause" for withdrawal. The district court did not abuse its discretion by allowing plaintiff's counsel to withdraw.

Similarly, the district court did not abuse its discretion by denying plaintiff's motion to amend his complaint. Insofar as plaintiff sought to add a separate legal malpractice claim against attorney Garvey and Sulloway and Hollis, his proposed amended complaint both failed to state a viable claim and was unsupported by the record. *See Hatch* v. *Dep't of Children, Youth and Their Families*, 274 F.3d 12, 19 (1st Cir. 2001). The defendants' submissions showed that plaintiff could not reasonably have relied on any comment attorney Garvey might have made about the statute of limitations when plaintiff filed this lawsuit because attorney Garvey expressly warned plaintiff *not* to rely on Sulloway and Hollis at that point. *See Sheinkopf* v. *Stone*, 927 F.2d 1259, 1264-65 (1st Cir. 1991)

(attorney-client relationship may be implied only where record shows purported client's reliance on attorney was objectively reasonable or that attorney knowing of such reliance did nothing to negate it) (citation omitted).[5]

We also reject plaintiff's contentions that the district court should have disqualified Sulloway and Hollis in response to the allegations raised in plaintiff's motion to amend his complaint and that this court should do so now.[6] To be sure, an attorney's fiduciary duties may be triggered by an initial consultation even if employment does not result. *See, e.g.*, *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978); *Polyagro Plastics, Inc.* v. *Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 256 (D.P.R. 1995). And the fact that the defendants' submissions showed that Sulloway and Hollis never represented plaintiff in this lawsuit does not necessarily mean that plaintiff did not disclose confidential information to attorney Garvey that might have disqualified Sulloway and Hollis from defending this case. But even if we assume that plaintiff made such a disclosure, disqualification was not required absent some showing that this gave defendants an unfair advantage in this case. *See Kevlik* v. *Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984) (holding dilatory disqualification motions may be granted when

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[5] It is also clear that plaintiff had decided to sue attorney Gannon and WS&P before he contacted Sulloway and Hollis and that plaintiff voluntarily dismissed his bankruptcy appeal after attorney Gannon properly withdrew from it. Plaintiff has only himself to blame for the loss of this avenue of review.

[6] We reject defendants' claim that plaintiff has waived the disqualification issue. "Failures to object, unless a true waiver is involved, are almost always subject to review for plain error." *See Chestnut* v. *City of Lowell*, 305 F.3d 18, 19 (1st Cir. 2002) (en banc) (per curiam).

either the court's confidence in the attorney's vigorous representation of his client is threatened or the attorney is in a position to use privileged information to the unfair advantage of the new client) (citations omitted). Plaintiff made no such showing. Absent an actual adverse effect, "merely 'conducting [a] trial with counsel that should have been disqualified does not "indelibl[y] stamp or taint" the proceedings.'" *See Fiandaca* v. *Cunningham*, 827 F.2d 825, 831 (1st Cir. 1987) (citations omitted). Similarly, because plaintiff has failed to show how any alleged conflict on the part of defense counsel tainted the summary judgment proceedings, he is not due a second bite at the apple now.

III.

Finally, we turn to the summary judgment. Like the bankruptcy court, the district court assumed that plaintiff's Connecticut whistleblower and free speech claims both rested on the theory that BEX fired him in retaliation for his anonymous complaint to the FAA. On appeal, plaintiff argues that this was error, that his "true § 31-51q claim" did *not* require him to prove that BEX knew about his complaint to the FAA, and that the district court erroneously overlooked this claim and failed to view the record in the light most favorable to him. We recognize that the district court overlooked certain evidence (e.g., the Costa tape) and that the court did not address what plaintiff now says was his "true § 31-51q" claim. Even when we account for these omissions, the record fails to show that attorney Gannon's alleged malpractice even arguably caused the loss of plaintiff's retaliatory discharge claims.

We review the district court's decision de novo, mindful that "on a motion for summary judgment all reasonable inferences must be drawn in favor of the non-moving party, regardless of who bears the ultimate burden of proof." *See Douglas* v. *York County*, 360 F.2d 286, 288 (1st Cir. 2004). The record discloses that plaintiff worked for BEX for approximately one year, during which he commuted to BEX's Westport, Connecticut headquarters from his home in Long Ann, New Jersey. Sometimes, plaintiff was late for work. Although plaintiff insists that it was all a fabrication, the OUCC's evidence before the bankruptcy court disclosed that plaintiff was late at least five times before he engaged in any arguably protected conduct. Indeed, on January 4, 1994, plaintiff's supervisor (DiPaola) warned plaintiff that he would be terminated if he was late once more.[7]

On January 29, 1994, plaintiff made an anonymous telephone complaint to the FAA about BEX's shortstaffing. On the following day, plaintiff made similar complaints to BEX managers O'Brien and Heller in two separate telephone conversations that plaintiff secretly tape-recorded.[8] In these conversations, plaintiff protested the fact that he was scheduled to work the next day (1/31/94) even though he had not had enough time off to rest to enable him to dispatch aircraft safely. Although plaintiff emphasized that BEX should employ enough staff to operate its airline safely, he also complained that BEX had scheduled him to work in retaliation for a grievance that he had previously filed, and he only agreed to work (and indeed, did work)

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[7] The district court erroneously attributed this warning to supervisor Heller. The Heller warning came one month later.

[8] Heller eventually realized that he was being taped.

after Heller assured him that he would be paid time and a half for his efforts. A few days after that (i.e., on 2/4/94), BEX supervisor Heller called plaintiff into his office and, after noting that plaintiff had once worked for the FAA, warned plaintiff that he would be fired if he was late for work again or if he released a flight late. BEX records indicate that plaintiff thereafter was late several more times before his February 28th discharge.

Plaintiff maintains that the foregoing chain of events suffices to prove that BEX fired him in retaliation for his 1/29/94 anonymous complaint to the FAA (in violation of § 31-51m and § 31-51q), and, if not for that, then for his 1/30/94 telephone complaints to managers O'Brien and Heller (in violation of § 31-51q only). We disagree. The record shows only that it was just barely possible that the FAA investigated plaintiff's complaint, and there was no evidence that, if any such investigation occurred, it occurred under circumstances that would have suggested that plaintiff had triggered the investigation. On this record, the proffered admissible evidence was simply too weak and speculative to permit a rational factfinder to infer that BEX fired plaintiff for whistleblowing. Thus, summary judgment on this aspect of plaintiff's legal malpractice claim was proper. *See* 5 R. Mallen & J. Smith, *Legal Malpractice*, § 33.11, p. 87 (5th ed. 2000) ("A possibility is not sufficient to allow an issue to go to the jury, even if the attorney's negligence impaired the client's ability to marshal the necessary evidence."). *See also*, *Witte* v. *Desmarais*, 614 A.2d 116, 120-21 (N.H. 1992) (causation is not for jury where reasonable minds can not differ on the outcome); *Arnone* v. *Town of Enfield*, 831 A.2d 260, 267 (Conn. 2003) (holding plaintiff must "produce sufficient

evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation").[9]

Similarly, we conclude that no reasonable jury could find that BEX discharged plaintiff "on account of" the safety-related statements that he made to his supervisors in the context of complaining about his work schedule. *See, e.g.*, *Lowe* v. *Amerigas, Inc.*, 52 F. Supp. 2d 349 (D. Conn. 1999) (citations omitted). On this record, the evidence of plaintiff's tardiness that was before the bankruptcy court remains essentially unimpeached. As the district court correctly noted, the report of plaintiff's aviation expert did nothing to undermine the evidence of plaintiff's tardiness. Plaintiff's unsupported claims of fabrication add nothing to his case. *See Fennell* v. *First Step Designs, Ltd.*, 83 F.3d 526, 533-37 (1st Cir. 1996). The record shows that, saddled with a lengthy commute, plaintiff was sometimes late for work notwithstanding repeated warnings. Even when the evidence attorney Gannon did not offer is factored into the picture, no reasonable jury could find that plaintiff's complaints to the FAA or to BEX managers prompted his discharge. Therefore, the district court did not err by granting defendants summary judgment on plaintiff's legal malpractice claims.

The appellees' motion to file a sur-reply brief is *allowed*. The judgment of the district court is summarily *affirmed*. *See* Loc. Rule 27(c).

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[9] *Contrast*, *LaFond* v. *General Physics Services Corp.*, 50 F.3d 165 (2d cir. 1995) (vacating summary judgment where plaintiff himself informed employer of his whistleblowing activity). Here plaintiffs has not suggested that he told anyone at BEX that he had complained to the FAA.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Rex Fornaro Civil No. 00-189-B

v.

William S. Gannon, Esquire
Wadleigh, Starr & Peters, PLLC

MEMORANDUM AND ORDER

(Filed May 16, 2003)

Rex Fornaro brings this *pro se* legal malpractice action against William S. Gannon, Esq. and Wadleigh, Starr & Peters, P.L.L.C. (the "Wadleigh firm"), a law firm located in Manchester, New Hampshire. Fornaro alleges the defendants committed legal malpractice in the litigation of an employment claim against his former employer. Before me is defendants' motion for summary judgment. (Doc. No. 37)

Defendants argue that they are entitled to summary judgment because Fornaro cannot demonstrate that he would have been successful in his underlying claim but for defendants' alleged negligence. I agree. Accordingly, I grant defendants' motion.

I. BACKGROUND[1]

A. Facts Related to Fornaro's Termination Claim

Fornaro worked as a flight dispatcher for Business Express ("BEX"), an airline carrier, from January 1993 through February 28, 1994. He worked at BEX's headquarters in Westport, Connecticut

On January 24, 1994, Fornaro made an anonymous complaint to the Federal Aviation Administration's ("FAA") Aviation Safety Hotline. His complaint consisted of "non-specific" information that BEX was understaffed and a claim that scheduling of flight crews was an issue. Ex. J. to Defs' Mot. for Summ. J. The FAA memorandum detailing his complaint states that the safety hotline took no action on his complaint because "the caller" provided only "non-specific" information. *Id.*

Fornaro's personnel file at BEX contains multiple reports of tardiness. Fornaro's supervisors, Mary DePaola and Wayne Heller, both spoke with him about his tardiness and entries reflecting these discussions were made in Fornaro's personnel file. On January 4, 1994, prior to Fornaro's FAA complaint, Heller told Fornaro that he would be terminated the next time he was late for work. BEX's attendance log for the week of February 29, 1994 reflects that Fornaro was late for work on February 25, 26, 27 and 28, 1994. Fornaro was terminated on February 29, 1994.

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[1] The background facts are presented in the light most favorable to the non-movant, Fornaro. *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 94 (1st Cir. 2001).

Fornaro's supervisors both contend that they did not learn of his FAA complaint until several years after he was terminated. Fornaro claims, however, that two days after he made his complaint, he overheard a fellow BEX employee, Tom DeMarco, comment that BEX was aware of a pending FAA investigation against the company.

B. Litigation of Underlying Claim

Fornaro subsequently retained Richard Franchi, an attorney in Connecticut, to represent him in a suit against BEX. Franchi sued BEX in Connecticut Superior Court on Fornaro's behalf on October 9, 1995. The complaint in the Connecticut action included a common law wrongful termination claim, a claim based on Connecticut's Whistleblower Statute, Conn. Gen. Stat. § 31-51 (1997 & Supp. 2002) and a claim based on a Connecticut statute prohibiting the discipline or discharge of employees on account of employee's exercise of certain constitutional rights, Conn. Gen. Stat. § 31-51q (1997 & Supp. 2002). BEX subsequently filed for bankruptcy protection in the United States Bankruptcy Court for the District of New Hampshire. In February 1996, Franchi filed a $199,856.62 proof of claim in the bankruptcy court proceeding based on the same legal theories that formed the basis of Fornaro's Connecticut lawsuit.

At Fornaro's request, Attorney William Gannon filed an appearance in the bankruptcy court proceeding on June 4, 1996. On April 15, 1997, the bankruptcy court issued an order confirming a reorganization plan for BEX under which its assets were to be sold and the proceeds distributed to creditors according to their priority. In May 1997, the Official Creditors' Committee for BEX filed an objection

to Fornaro's claim. The objection was served on Franchi, who subsequently filed a response on June 4, 1997. After Franchi filed his response, Fornaro informed Gannon that he wanted Gannon, instead of Franchi, to be his lead counsel in the bankruptcy proceeding.

The Creditors' Committee subsequently offered Fornaro a $175,000 allowance for his claim. Although Gannon repeatedly recommended that Fornaro accept the allowance, *see* Ex. H, (a)-(f) of Defs' Mot. for Summ. J., he refused because the offer did not require BEX to purge several disciplinary reports from his personnel files.

Fornaro's claim was tried before Judge Vaughn in the bankruptcy court on February 22 and 23, 1999. In a detailed order dated February 11, 2000, Judge Vaughn rejected all three of Fornaro's causes of action because he determined that BEX had legitimately terminated Fornaro for tardiness. *See In re Business Express, Inc v. Fornaro*, 2000 WL 33679420, No. 96-10130-MWV (Bankr. D.N.H.). In reaching this conclusion, Judge Vaughn also necessarily rejected Fornaro's claim that BEX terminated him because he had filed a complaint with the FAA. *See id.*

C. Malpractice Claim

Fornaro filed this action in April 2000. He claims that Gannon and the Wadleigh firm committed malpractice by failing to: (1) timely amend the proof of claim in the bankruptcy proceeding; (2) retain an expert to quantify Fornaro's damages; (3) retain an expert to demonstrate that his personnel file had been falsified; (4) take depositions and retain experts to rebut allegedly false testimony; (5) call witnesses to demonstrate that Fornaro was fired in

an act of retaliation; and (6) present sufficient evidence of retaliation.

Fornaro retained legal malpractice trial experts, David Scholl and Martin Margulies, for purpose of identifying the appropriate standard of care, breaches of that standard, and the effect that the breaches had on the bankruptcy proceeding. Margulies and Scholl, in separate reports, identified evidence that they claim either should have been offered in the bankruptcy proceeding or at least "investigated" by Gannon. This evidence consisted of: (1) Fornaro's secretly taped telephone conversations with his supervisor Heller, and with John O'Brien, BEX's vice president of flight operations, the day after Fornaro's complaint to the FAA; (2) Fornaro's secretly taped telephone conversation with DeMarco and Joe Costa, the FAA inspector who oversaw BEX at the time of Fornaro's complaint; (3) testimony of Costa, O'Brien, DeMarco; (4) a February 1995 letter from Tom Huettner, an FAA official, stating that Fornaro's FAA complaint had been passed on to the regional FAA office; (5) a letter dated February 15, 1995 from Attorney Franchi to the president of BEX discussing Fornaro's FAA complaint; and (6) testimony of an aviation expert, Kit Darby, challenging certain disciplinary reports in Fornaro's personnel file related to his job performance, but not his tardiness. Ex. M to Pls' Obj. to Defs' Mot. for Summ. J.

II. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In this context, "a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." *Intern'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted).

Once the moving party carries its burden, the burden shifts to the nonmoving party to "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted." *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996) (citing *Celotex*, 477 U.S. at 323; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). If the non-moving party provides "evidence that is merely colorable, or is not significantly probative," summary judgment should be granted. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992) (quoting *Anderson*, 477 U.S. at 249-50) (internal quotation marks omitted). Moreover, Fornaro is not freed from the obligation to comply with procedural rules merely because he is proceeding pro se. *See Ruiz Rivera v. Riley,* 209 F.3d 24, 27 n.2 (1st Cir. 2000).

III. ANALYSIS

A plaintiff in a legal malpractice case must prove that: (1) an attorney-client relationship existed between the

plaintiff and his attorney; (2) a breach of that duty occurred; and (3) compensable harm was *caused* by the breach. *Wong v. Ekberg*, 148 N.H. 369, 373 (2002) (citing *Mahoney v. Shaheen, Cappiello, Stein & Gordon*, 143 N.H. 491, 495-98 (1999) (emphasis added). To satisfy the causation requirement in a case where the alleged malpractice occurred in connection with a litigated claim, a plaintiff must demonstrate that "but for" the attorney's misconduct, a claim or defense in the underlying action would have been successful. *See Fairhaven Textile Corp. v. Sheehan, Phinney, Bass & Green, PA*, 695 F.Supp. 71, 75 (D.N.H. 1988). Therefore, if a legal malpractice plaintiff has had the benefit of a full trial on the merits with respect to an underlying claim, the focus of the causation analysis becomes whether the additional evidence, at this stage construed in the light most favorable to the plaintiff, would have produced a different result. *See id.; see also Morris v. Getscher*, 708 F.2d 1306, 1310-11 (8th Cir. 1983) (court in subsequent malpractice case is not free to redecide issues decided in an underlying trial, instead, the fact finder is limited to deciding whether but for the malpractice, the result in the earlier case would have been different).

Fornaro asserted three claims in the underlying action: (1) wrongful termination;[2] (2) a violation of Conn. Gen. Stat. § 31-51m; and (3) a violation of Conn. Gen. Stat.

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[2] The Connecticut Supreme Court has recently held that Conn. Gen. Stat. § 31-51m provides the exclusive remedy for employees who are terminated for whistleblowing. *See Campbell v. Town of Plymouth*, 811 A.2d 243 (Conn. 2002). Nevertheless, I will assume for purposes of analysis that when Fornaro commenced the underlying action, he would have been permitted to assert distinct claims for wrongful termination and a violation of the whistleblower law.

§ 31-51q. All three claims depend upon Fornaro's assertion that BEX discharged him because he had made an anonymous complaint to the FAA rather than, as BEX asserts, because he repeatedly was late for work. *See, e.g., Thibodeau v. Design Group One Accountants, LLC*, 802 A.2d 731 735-36 (Conn. App. 2002) (wrongful termination); *Lafond v. General Physics Services Corp.*, 50 F.3d 165, 172-74 (2nd Cir. 1995) (Conn. Gen. Stat. § 31-51m); *Williams v. Bayer Corp.*, 982 F.Supp. 120, 123 (D. Conn. 1997) (Conn. Gen. Stat. § 31-51q.). Because Judge Vaughn expressly rejected this assertion in the underlying action, Fornaro cannot prevail unless he can prove that Judge Vaughn would have reached a different conclusion but for his attorneys' malpractice.

The evidence that Fornaro's experts identify does not, by even the most lenient reading, support Fornaro's claim that he was discharged because he complained to the FAA. First, Fornaro's experts argue that DeMarco's testimony and a tape of a telephone conversation between Fornaro and DeMarco should have been presented in the bankruptcy proceeding. The transcript of the telephone conversation indicates, however, that DeMarco does not remember making any comments regarding a complaint from the FAA to Fornaro while DeMarco was employed by BEX. At most, the transcript demonstrates that, after both DeMarco and Fornaro were no longer employed by BEX, DeMarco "heard" that Heller was being investigated by the FAA. This does nothing to connect Fornaro's anonymous complaint to his termination.

Second, Fornaro's experts allege that Gannon should have offered as evidence taped telephone conversations between Fornaro, Heller, and BEX's vice-president, O'Brien. As the transcripts of these conversations indicate,

however, at no point in either conversation was a complaint to the FAA mentioned. While these discussions demonstrate that Fornaro was upset with his schedule at BEX, they do not link him to the FAA complaint.

Third, Fornaro's experts contend that Gannon should have offered the transcript of a taped conversation between Fornaro and Costa, the FAA inspector who oversaw BEX at the time. When read in its entirety, the transcript of this conversation demonstrates nothing more than the fact that Costa was not certain whether anyone ever passed Fornaro's anonymous complaint on to BEX. The conversation does nothing to bolster Fornaro's causation argument.

Fourth, Fornaro's experts argue that Gannon should have offered a letter dated February 15, 1995 to BEX's president, Brian Bedford, from Attorney Franchi. This letter explains that Fornaro intends to file a wrongful termination suit against BEX. It does not support Fornaro's effort to prove a connection between the FAA complaint and his termination.

Fornaro's experts also argue that Gannon should have introduced a letter from FAA supervisor Huettner to Fornaro. In summary, this letter explains that a copy of Fornaro's complaint was provided to the FAA's New England regional office even though the complaint's "nonspecific nature" did not require a response. This letter does not provide any link between Fornaro's supervisors and the FAA complaint. Indeed, the letter further demonstrates that the FAA never investigated Fornaro's complaint.

After considering the evidence that Fornaro contends should have been offered to support his claims, I am

satisfied that he fails to establish that BEX was even aware that one of its employees had made a complaint to the FAA. Because such proof is vital to Fornaro's malpractice claim, defendants are entitled to summary judgment.[3]

IV. CONCLUSION

Viewing the record in a light most favorable to Fornaro, he has failed to demonstrate facts sufficient to fulfill the causation requirement of his legal malpractice claim. Accordingly, I grant defendants' motion for summary judgment (Doc. No. 37).[4] The clerk of the court shall enter judgment in favor of the defendant.

SO ORDERED.

/s/ Paul Barbadoro
Paul Barbadoro
Chief Judge

May 16, 2003

cc: Rex Fornaro, pro se
Michael Lonergan, Esq.

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[3] Fornaro's experts also contend that an aviation expert's report demonstrates that non-tardiness related disciplinary reports in Fornaro's personnel file were without merit. Because the aviation expert's report does nothing to call into question Judge Vaughn's finding that BEX terminated Fornaro due to his tardiness, I decline to analyze the merits of the report.

[4] Because Fornaro has not succeeded in calling into question Judge Vaughn's conclusion that Fornaro was terminated for tardiness rather than for filing a complaint with the FAA, I do not consider the merits of his other malpractice claims.

United States Court of Appeals
For the First Circuit

No. 03-1816

REX FORNARO,

Plaintiff, Appellant,

v.

WILLIAM S. GANNON, ESQ., ET AL.,

Defendants, Appellees,

ROBERT E. MURPHY, ESQ.,

Defendant.

Before

Boudin, *Chief Judge*,
Torruella, Selya, *Circuit Judges*,
Cyr, *Senior Circuit Judge*,
Lynch, Lipez and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: February 1, 2005

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Richard Cushing, Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

[cc: Rex Fornaro, Michael M. Lonergan, Esq. and Margaret H. Nelson, Esq.]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

IN THE MATTER OF:	Case #96-10130
BUSINESS EXPRESS, INC.	Manchester, New Hampshire February 22, 1999
Debtor	9:20 a.m. O'clock

TRANSCRIPT OF HEARING ON OBJECTION TO CLAIM FILED BY OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO ALLOWANCE OF REX FORNARO CLAIM; MOTION BY OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR DECLARATORY JUDGMENT REGARDING RESPONDENT'S ALLEGED DAMAGE CLAIM; MOTION BY CREDITOR REX FORNARO TO FILE AMENDED PROOF OF CLAIM

BEFORE THE HONORABLE
MARK W. VAUGHN, J.U.S.B.C.

(Filed Apr. 6, 2000)

* * *

[58] MARY DEPAOLA – Cross/Gannon

* * *

Q. Now, Ms. DePaola, the – the first warning, Plaintiff's Exhibit 1 –

A. Mmhmm.

Q. – is dated July 10, 1993.

A. Mmhmm.

Q. That one may predate the employee handbook, correct?

A. Right.

Q. Okay. But if you direct your attention –

A. Mmhmm.

Q. – to that form for a minute –

A. Mmhmm.

Q. – what day did you prepare this exhibit?

A. I don't recall exactly the particular date that I prepared it.

Q. You don't?

A. No.

Q. Could it have been a year after the incident?

A. No. No, it would have been within a few days, but I don't know exactly which date I prepared it.

Q. Okay. Well, do you see your signature line?

[59] A. Yes.

Q. And what date is that?

A. It shows a 7-10, and I must have put '94 instead of '93 by mistake, but that's – it was 7-10 is when I prepared it.

Q. 7-10 of what year?

A. It would have been '93.

Q. You just wrote '94?

A. By mistake. I was – I may have been busy and – as I was signing it.

Q. How do you know the '93 is correct and the '94 is wrong?

MR. FEINSMITH: Objection, Your Honor. She's already answered that question.

THE COURT: I think that's argumentative. She's testified that, in fact, she signed it in '93, and she made a mistake.

BY MR. GANNON:

Q. Okay. The – it doesn't indicate in the upper right-hand corner that copies of this were going anywhere, does it?

A. No.

Q. And can you explain to me how this ended up in Mr. Fornaro's personnel file?

A. I always – anytime I counseled anyone or there was a verbal or a written, I always put something in the personnel file.

Q. And this doesn't list any prior warning dates?

A. No, because that was the first warning.

* * *

[122] WAYNE HELLER – Cross/Gannon

* * *

Q. Okay, and for the sake of cleaning this up as we go forward, you were the person who on February 28 actually fired Mr. Fornaro?

A. Yes.

Q. Now I think your testimony, as I understand it, is that Mr. Fornaro's alleged tardiness, as you perceived it, posed a significant threat to safety?

A. Yes.

* * *

[123] Q. And over a period slightly in excess of a year, Mr. Fornaro was late, as I understand it, six documented times?

A. Six documented times.

Q. Okay, and do you have an idea what percentage six over 365 is?

A. N – I couldn't give you the percentile.

Q. Okay, but it's relatively small?

A. Yes, but he was late a lot more than six documented times.

Q. As reported to you?

A. Correct.

Q. By someone else?

A. Yes.

Q. Outside of your direct personal knowledge?

A. If you want to put it that way, yeah.

Q. I do. Is that true?

A. Yes. I don't feel that people would lie, though.

Q. You don't?

A. No.

Q. Okay. Now if I'm understanding your testimony correctly, it really wasn't the lateness, it was the safety issue?

MR. FEINSMITH: Objection, Your Honor. I don't think that he testified to that.

THE COURT: Why don't you rephrase the question.

BY MR. GANNON:

[124] Q. Were you concerned about the lateness because it posed a significant safety threat?

A. Yes.

Q. I thought – that's what I thought you said, too.

A. Well, Rex's tardiness inhibited his ability to do his job.

Q. I'm not arguing with that. I'm just trying to understand where you were. That's where you are, right? Rex's tardiness inhibited his ability to do his job properly, and it created a significant safety risk?

A. Yes.

Q. You have to say Yes, Mr. Heller.

A. I'm hesitating because I feel like I'm being set up here. I'm sorry.

THE COURT: Just answer the questions. Don't worry about where he's going.

* * *

[131] MR. GANNON: Well, the relevance, Your Honor, is clear and simple. Mr. Heller is trying to convert an alleged lateness problem into a safety issue to justify stepping around the normal policy, and the fact of the matter is that this safety problem is just as fabricated as a great deal of the rest of the testimony, and in about a minute, we're going to prove that.

* * *

MR. GANNON: It's going to show in about three questions, Your Honor, that safety was never an issue.

* * *

[132] BY MR. GANNON:

Q. Mr. Heller, have you had a chance to look at the entries?

A. Yes.

Q. Okay. Putting aside the question of whether this is a self-serving letter or not, is – what Mr. Fornaro did is he ran through all the adverse reports in his file, correct?

A. I don't know if he did or not.

Q. Okay. Well – so he may have simply selected certain doc – let – tell you what, let me go at it this way. If his tardiness raised the type of safety and performance issues that you allege, releases going after the scheduled departure time, can you show me an employee disciplinary report that deals with that issue?

MR. FEINSMITH: Objection, Your Honor. How could he possibly – he's not the keeper of the records. He's here as a wit – as a fact witness today.

THE COURT: No, I'll allow him to answer the question.

BY MR. GANNON:

Q. Can you show me one?

A. No. I don't have one here.

Q. Okay. Did you ever complete any?

[133] A. No.

Q. But you knew about this problem?

A. I knew about Rex being late, yes.

Q. Well, you – did you or did you not know about releases going to the cockpit after the scheduled departure time?

A. Yes.

Q. But you didn't fill out an employee disciplinary report?

A. No.

* * *

[LOGO]

November 28, 2001

This is an analysis for Mr. Rex Fornaro and the Law Office of Dan Neelon. It is a review and opinion of certain disciplinary reports that were placed in the personnel records of Mr. Fornaro while he was employed as a dispatcher with Business Express Airlines. This report was constructed by Mr. Kit Darby, President of Aviation Information Resources, Inc. (AIR, Inc.) an aviation consulting and career information firm in Atlanta, Georgia.

Mr. Darby is president of AIR, Inc. and former ⅓ owner and executive vice president of the Future Airline Pilots of America. Mr. Darby is a Captain for a major U.S. airline and was a military standardization/instructor pilot and instrument flight examiner in the United States Army and Georgia National Guard for 23 years.

There are three disciplinary reports under this review. Report 1 is related to a scheduling error that pertains to weather minimums required for a flight. Report 2 is related to Mr. Fornaro's failure to issue a release with a disclaimer. Report 3 is a flight control irregularity report pertaining to the release time for a flight in accordance with Business Express operating procedures. This analysis involves a review of pertinent Federal Aviation Regulations (FAR) as applied to Mr. Fornaro's reports. The FARs are federal regulations that govern many aspects of aviation in the United States, including the licensing of airmen (including dispatchers) and air carrier operations.

Report 1

This report is dated May 9, 1993. Mr. Fornaro was accused of issuing a dispatch release for a flight to Presque Isle, Maine when the weather was below the minimums required. The weather report indicated that the forecast visibility at the time of arrival for Presque Isle was 1 mile, occasionally ½ mile. A Notice to Airmen (NOTAM), was also included in the weather report. A NOTAM advises flight crews and planners of otherwise unpublished circumstances that may affect the flight. One NOTAM in the weather report stated that the glideslope for the ILS 1 approach was out of service. This would affect the minimums permissible for the flight to be dispatched. The minimums for the approach with the glideslope out of service is ½ mile. This minimum was met, and it was appropriate for the aircraft to be dispatched under these circumstances.

Report 2

This report is dated January 24, 1994. Mr. Fornaro was accused of being behind in his releases for a portion of the day. He advised his supervisor that he was awaiting a minimum equipment list (MEL) item on an aircraft prior to issuing the release. His supervisor stated that the releases should have been issued with a disclaimer. This in essence would be delegating part of his authority to another person to determine whether the flight should be dispatched in compliance with the MEL. FAR 121.663 clearly states, The dispatcher . . . may not delegate his authority to dispatch. Had Mr. Fornaro done what was suggested by his supervisor, he clearly would have been in violation of the FARs.

Report 3

This report is dated January 31, 1994. Mr. Fornaro was accused of not properly issuing a release for a flight. Each airline has a set of operating rules that are approved by the Federal Aviation Administration. These internal rules are known as OP SPECS (Operations Specifications), and each airline is required to comply with their OP SPECS. The Business Express OP SPECS states that dispatch releases will be sent between 30 minutes and one hour before the departure time of the first flight authorized in the release. The flight in question, flight 4502, was scheduled for a departure time of 3:45 PM. This means that the flight would be released between 2:45 PM and 3:15 PM. On the date in question, Mr. Fornaro completed his shift and left work at 2:25 PM. Had Mr. Fornaro issued a release for flight 4502 before leaving for the day, he would have been in violation of his own company's operating rules.

In summary, it appears that foundation for each of these disciplinary reports is without merit. Mr. Fornaro would have been required to violate FAA regulations or Business Express procedures to avoid receiving them.

Sincerely,

/s/ Kit Darby

Kit Darby
President
AIR, Inc.

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